

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COLIN CAMPANO,
 plaintiff,

 v.

PHC COMPANY, defendant and
 third-party plaintiff,

 v.

EBCO SERVICE CORP., INC., et al.,
 third-party defendants.

CIVIL ACTION

NO. 97-4834

MEMORANDUM

Broderick, J.

August 19, 1998

Plaintiff Colin Campano filed this diversity action seeking recovery for injuries he sustained while working on a construction project in Great Valley, Pennsylvania. PHC Company ("PHC") was a prime contractor for the project, while Ebco Service Corp., Inc. ("Ebco") was the plaintiff's employer and one of PHC's subcontractors. The plaintiff has settled his claims against all parties and received workmen's compensation benefits from Ebco. PHC, who contributed to the plaintiff's settlement, seeks indemnity from Ebco pursuant to an indemnity clause contained in the subcontract between PHC and Ebco. Presently before the Court are PHC's and Ebco's cross-motions for summary judgment concerning the enforceability of this indemnity clause. For the reasons set forth below, the Court finds that the PHC-

Ebco indemnity agreement does not satisfy the strict requirements under Pennsylvania law for waiving liability for injuries to an employer's own employees under the Workmen's Compensation Act. Accordingly, Ebco need not indemnify PHC and judgment will be entered in favor of Ebco and against PHC on the cross-motions for summary judgment.

I. STATEMENT OF FACTS

The parties have agreed that there are no genuine issues of material fact for purposes of deciding their cross-motions for summary judgment. The stipulated facts may be summarized as follows: Plaintiff Colin Campano was a citizen of New Jersey at the time of the accident in question. Giles J. Cannon ("Cannon") and PHC were both citizens of Pennsylvania, having their principal places of business in the Commonwealth and having been incorporated here. Ebco was a citizen of New Jersey, having its principal place of business in New Jersey and having been incorporated there.

In 1995, PHC and Ebco entered into a subcontract for the installation of heating, ventilation, and air conditioning duct work on a construction project at the Great Valley High School in Great Valley, Pennsylvania. The subcontract was executed in Pennsylvania, involved work to be performed in Pennsylvania, and listed Pennsylvania addresses for both parties. PHC was listed on the subcontract at its principal place of business in

Pennsylvania, while Ebco was listed at a business location it maintains in Philadelphia.

The plaintiff worked as a sheet metal foreman for Ebco on the Great Valley project. On July 27, 1995, he was injured at the site when an employee of Cannon, a concrete subcontractor, caused a large piece of wood to fall and strike the plaintiff's head. As a resident of New Jersey and an employee of a New Jersey corporation, the plaintiff sought and received workers' compensation benefits from Ebco under the New Jersey Workers' Compensation Act.

In 1996, the plaintiff commenced an action in this Court against Cannon, who then joined PHC as a third-party defendant (Docket No. 96-cv-5919). PHC filed a motion to dismiss the joinder complaint, claiming that it was immune from liability for the plaintiff's injuries as his statutory employer under the Pennsylvania Workmen's Compensation Act. On August 28, 1997, the Court denied the motion to dismiss on the grounds that the allegations, even if accepted as true, were insufficient to establish PHC's eligibility for statutory employer immunity under Pennsylvania law or even to establish the choice of law to be applied to the third-party claim.

Meanwhile, the plaintiff had also filed the instant action in 1997 to recover damages directly from PHC, since PHC had only been named as a third-party defendant in the 1996 action. The 1996 and 1997 cases were listed as related actions to be tried before this Court. PHC subsequently joined Ebco as a third-party

defendant in both cases in order to seek indemnity from Ebco in the event PHC was found liable for the plaintiff's injuries.

In February of 1998, PHC and Cannon settled the plaintiff's claims against them in both the 1996 and 1997 actions. PHC paid the plaintiff \$125,000 and Cannon paid him \$525,000. Ebco declined to participate in the settlement. Therefore, upon executing the settlement, all of the claims in both the 1996 and 1997 actions were resolved except for PHC's claims against Ebco for indemnity. The Court held a status conference in March 1998, at which time PHC and Ebco agreed that the issue of whether PHC was entitled to indemnity could be decided on summary judgment. Because PHC's claims were exactly the same in both the 1996 action and this action, the Court dismissed the 1996 action in its entirety, dismissed the settled claims in this action, and ordered PHC and Ebco to file cross-motions for summary judgment concerning PHC's claim for indemnity.

The parties filed cross-motions for summary judgment together with a stipulation of facts in May 1998. In its motion, PHC contends that it is entitled to indemnity from Ebco pursuant to a clause in the PHC-Ebco subcontract which reads in relevant part as follows:

4. SUBCONTRACTOR assumes entire responsibility and liability and agrees to indemnify and save harmless the CONTRACTOR and/or Owner from any loss, liability, expense, including attorneys' fees, damage or injury caused or occasioned, directly or indirectly, but [sic] its failure to comply with any of the following:

- (a) ...

- (b) ...
- (c) The payment of any and all loss or damage, direct or consequential, and claims of any kind or nature whatsoever, for property damage or personal injury, including death, to any and all persons, whether employees of CONTRACTOR or others, caused by, resulting from, arising out of or from, or occurring in connection with the performance of the work undertaken by SUBCONTRACTOR hereunder, including but not limited to claims due to the negligence of CONTRACTOR or Owner, or to any defect in material, equipment, or workmanship whenever the same may develop.

PHC seeks to recover from Ebco the \$125,000 which PHC paid to settle the plaintiff's claims, plus attorneys fees. Ebco, as the plaintiff's employer, however, contends that the clause is ineffective to waive its immunity for contribution or indemnity for injuries to its own employee.

II. DISCUSSION

The Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332, as the original plaintiff and defendant are citizens of different states and the amount in controversy exceeds \$75,000.

The cross-motions for summary judgment raise the following legal issue: is the indemnification clause in the subcontract between third-party plaintiff PHC and third-party defendant Ebco enforceable? The Court will look to Pennsylvania law, as PHC contends that the indemnification clause is enforceable under Pennsylvania law while Ebco contends that it is not.

Under Pennsylvania law, an employer is not required to indemnify another for injuries to the employer's own employees

unless the employer has explicitly waived its immunity afforded by the Workmen's Compensation Act. 77 Pa. C.S.A. § 481(b). To be effective, the waiver must be "clear and unequivocal." Kiewit Eastern Co., Inc. v. L&R Constr. Co., Inc., 44 F.3d 1194, 1199 (3d Cir. 1995) (citing Ruzzi v. Butler Petroleum Co., 588 A.2d 1, 4 (Pa. 1991)). As the Pennsylvania Superior Court has stated, "the parties must specifically utilize language which indicates that the employer/alleged indemnitor intends to indemnify the third party against claims by employees of the alleged indemnitor; this must clearly appear from the terms of the agreement." Snare v. Ebensburg Power Co., 637 A.2d 296, 299 (Pa. Super. 1993); see also Bester v. Essex Crane Rental Corp., 619 A.2d 304, 308-309 (Pa. Super. 1993).

The indemnification clause in the instant case fails to contain explicit language covering claims brought by Ebco's own employees. The clause states that Ebco agrees to indemnify PHC for claims to "any and all persons, whether employees of [PHC] or others, arising out of . . . the performance of the work undertaken by [Ebco]" (emphasis added). This language does not explicitly state that it applies to claims by Ebco's own employees.

As recognized in a factually similar case by my fellow judge, the Honorable James McGirr Kelly, an indemnification agreement must "state explicitly that it covers . . . claims brought by the employer's employees." USX Corp. v. International Ins. Co., No. 94-5534, 1996 WL 131030, at *4 (E.D. Pa. March 21,

1996). In both Judge Kelly's case and in this case, the indemnification agreement references claims based on the negligence of the employer, but it does not mention claims brought by the employer's own employees. Absent such specificity, Ebco has not waived its immunity and is not obligated to indemnify PHC for the plaintiff's recovery. Id.; see also Gulf Interstate Field Services, Inc. v. Henkels & McCoy, Inc., No. 98-651, 1998 WL 181935, at *2-3 (E.D. Pa. April 17, 1998). Accordingly, Ebco's motion for summary judgment must be granted and PHC's motion must be denied.

Having determined that the indemnification clause is not enforceable under Pennsylvania law, the Court is not required to determine its enforceability under New Jersey law, as PHC requests. PHC's choice of law argument is unavailing. In the related 1996 action, PHC and the other parties disputed whether Pennsylvania or New Jersey law applied. There, PHC sought immunity from liability under Pennsylvania's Workmen's Compensation Act. Now, when seeking to enforce rather than defend a claim for indemnity, PHC seeks to defeat Ebco's claim for immunity by claiming that New Jersey law applies.

A federal court must apply the choice of law rules of the forum state in which it sits. Klaxon v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941). Under Pennsylvania choice of law rules, the PHC-Ebco subcontract is clearly governed by Pennsylvania law. The parties executed the contract in Pennsylvania, the subject matter of the contract was located in

Pennsylvania, all performance was to be delivered in Pennsylvania, and both parties listed their places of business in Pennsylvania. See Compagnie des Bauxites de Guinee v. Argonaut-Midwest Ins. Co., 880 F.2d 685, 688-89 (3d Cir. 1989) (citing Griffith v. United Air Lines, 203 A.2d 796 (Pa. 1964)). The only contacts with New Jersey were that Ebco was incorporated there and that the plaintiff resided and sought workers' compensation benefits there. However, the plaintiff could have received workmen's compensation benefits in either Pennsylvania or New Jersey, since he was injured while working in Pennsylvania. Davish v. Gidley, 611 A.2d 1307, 1310 (Pa. Super. 1992).

Moreover, the fact that the plaintiff recovered workers' compensation benefits in New Jersey in no way affects the instant third-party action, which concerns whether Ebco is obligated to indemnify PHC under the terms of a subcontract which was executed and performed in Pennsylvania. Pennsylvania holds a more significant interest than New Jersey in the enforceability of this contract. Cf. Kruzits v. Okuma Machine Tool, Inc., 40 F.3d 52, 55-56 (3d Cir. 1994) (ruling that another state's interest in enforcing its workers' compensation act is not implicated where the Court is called upon to resolve a contractual dispute about indemnification). Therefore, the law of Pennsylvania, not New Jersey, governs the instant third-party dispute.

Accordingly, for the foregoing reasons, the Court will grant third-party defendant Ebco's motion for summary judgment, deny

third-party plaintiff PHC's motion for summary judgment, and enter judgment in favor of Ebco.

An appropriate Order follows.

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ORDER

AND NOW, this 19th day of August, 1998; upon consideration of the stipulation of facts filed by third-party plaintiff PHC Company, Inc. and third-party defendant Ebco Service Corp., Inc., their respective cross-motions for summary judgment, and their supporting memoranda of law; and for the reasons set forth in the Court's Memorandum of this date;

IT IS ORDERED:

1. The summary judgment motion of Ebco Service Corp., Inc. (Document No. 13) is **GRANTED**;

2. The summary judgment motion of PHC Company, Inc. is **DENIED**; and

3. Judgment is **ENTERED** in favor of Ebco Service Corp., Inc. and against PHC Company, Inc.

RAYMOND J. BRODERICK, J.